2004

# State of Utah v. Harold Netzler : Brief of Appellee

Utah Court of Appeals


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IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| HAROLD NETZLER, | : | Case No. 20040471-CA |
| Defendant/Appellant. | : | |

# BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. 76-6-302 (West 2004), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, UTAH, THE HONORABLE ROBIN W. REESE, PRESIDING


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ORAL ARGUMENT REQUESTED

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# BRIEF OF APPELLEE

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## JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a jury conviction for aggravated robbery, a first degree felony. This Court has jurisdiction under UTAH CODE ANN. § 78-2a-3(2)(j) (West 2004) (pour-over provision).

## STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

**1. Is the probative value of evidence that defendant threatened the victim—"if [you] show[] up in court [you will] be dead"—substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury?**

The decision by a trial court to admit evidence is reviewed for abuse of discretion. *See State v. Lindgren*, 910 P.2d 1268, 1271 (Utah App. 1996).

**2. Has defendant established that trial counsel was ineffective for not investigating alleged potential witnesses where his claim is entirely on extra-record allegations this Court rejected as speculative in denying defendant's rule 23B motion?**

"When a question of trial counsel ineffectiveness is raised for the first time on appeal and the review is confined to the trial court record, the question of ineffectiveness of counsel is a matter of law, to be reviewed for correctness." *State v. Boyatt*, 854 P.2d 550, 554 (Utah App. 1993). "[D]efendant bears the burden of assuring the record is adequate" to review his claim of ineffectiveness. *State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92.

**3(A). Can defendant raise a plain error challenge to the trial court's jury instruction on the elements of aggravated robbery where trial counsel affirmed on the record that defendant took no exception to the instruction below?**

No standard of review applies. Trial counsel affirmed all the instructions given on the record, including the aggravated robbery instruction at issue. *See* R244:164. Thus any error was invited and may not be reviewed, even for plain error. *See State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (holding that if "counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, [the appellate court] will not review the instruction" even under the plain error exception).

**3(B). Was trial counsel ineffective in affirming the aggravated robbery instruction for not including the uncontested element that defendant intended to permanently or temporarily deprive the 7-Eleven of the stolen beer?**

The standard of review is the same as that stated in issue 2.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

**UTAH CODE ANN. § 76-6-301 (West 2004):**

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft or wrongful appropriation.

(2) An act is considered to be "in the course of committing a theft or wrongful appropriate" if it occurs:

(a) in the course of an attempt to commit theft or wrongful appropriation;

(b) in the commission of theft or wrongful appropriation; or

(c) in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

**UTAH CODE ANN. § 76-6-302 (West 2004):**

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes seriously bodily injury upon another; or

(c) takes or attempts to take an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

**UTAH CODE ANN. § 76-1-601 (West 2004):**

Unless otherwise provided, the following terms apply to this title: . . .

(5) "Dangerous weapon" means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item; and:

(i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

## STATEMENT OF THE CASE

**Charge.** Defendant was charged with aggravated robbery, a first degree felony, in violation of UTAH CODE ANN. § 76-6-302 (West 2004). R94-95. The charge was subject to a gang enhancement pursuant to UTAH CODE ANN. § 76-3-203.1 (West 2004). *See* R94-95.

**Conviction.** Following a one-day jury trial on 19 February 2004, defendant was convicted as charged. R156-157; R244:199.

**Sentence.** The trial court imposed the statutory indeterminate term of 9-years-to-life, which it then suspended and placed defendant on a three-year term of probation. R197-98, 201.

**Notice of appeal.** Defendant filed a timely notice of appeal in the Utah Supreme Court. R211.

**Transfer order.** The supreme court transferred the case to this Court. R239.

## STATEMENT OF THE FACTS[1]

The night of 6 February 2003, defendant and his friends, Peni Teo and Ruland Anthony, were up late drinking brandy and coke. R244:24, 26, 28-30. Defendant was depressed and wanted to get "wasted." R244:99. When they ran out of brandy, defendant suggested that they stop at a 7-Eleven for some beer. R244:32-33, 99. Teo, who was driving, parked the car on the road at the side of the store rather than the parking lot, for an easier get away. R244:32, 100. Defendant said he was going to "go in there and grab the beer and come back out." R244:33. Defendant got out of the car and walked into the store. R244:34. Although Anthony followed defendant toward the store, he eventually stopped and waited by the corner of the building. *Id.*

Once in the store, defendant went to the beer cooler and removed two cases of beer. R244:37, 60, 63. He then quickly walked past the cash register and toward the front door. R244:63-65. As he neared the door, one of the store clerks, Terrye Rowland, stood by the door and said, "Let's not do this." R244:61, 64. Defendant ignored her and walked out of the door. R244:65. Terrye had to step out of the way to avoid being run over. R244:64-65.

Terrye followed defendant. R244:35, 65-67. As defendant passed the corner of the store, she heard him say, "She's right behind me." R244:67. Terrye then saw Anthony, who put his hand down the front of his pants and said, "Stop, bitch, or I'll shoot you." R244:67-

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[1]The facts are recited in the light most favorable to the jury verdict. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92.

68. Terrye stopped, and defendant and Anthony walked toward the car. R244:69. Terrye moved slowly behind the car and read its license plate number. *Id.* Anthony turned and put his hand down his pants again and said, "Didn't you hear what I said?" *Id.* He and defendant then got in the car. R244:71. Peni drove the trio to defendant's sister's apartment where they "cracked the cases open and started handing the beer out." R244:124; *see also* R244:38, 122.

Terrye immediately notified the police of the beer heist. R244:74. Within minutes, Deputy Wilson arrived. R244:91-92. Terrye's manager gave him the video tape from the in-store surveillance camera and the license plate number of the car. R244:92. Using the license plate number, Deputy Wilson located the car in the parking lot of a nearby apartment building. R244:92-93. He staked the car out with another deputy and arrested defendant, Peni, and Ruland when they left the apartment complex. R244:92-96. During the arrest, defendant confessed that it was his idea to steal the beer, that he made it clear to Peni and Ruland that he was going to steal the beer, and that he thought Ruland threatened Terrye only to scare her into not calling the police. R244:100-01. He also claimed that Ruland did not, in fact, have a gun. *Id.*

During the months between the robbery and defendant's trial, defendant was ordered to stay away from the 7-Eleven. R244:76. Despite that order, he visited the 7-Eleven at least four times. *Id.* During the last of those visits, he told Terrye that "if [she] showed up in court [she] would be dead." R244:77.

At trial, the State presented testimony from Peni, Terrye, and Deputy Wilson. R244;21-107. Deputy Wilson recounted defendant's confession. R244:97-101. Both he and Terrye testified about defendant's post-robbery threat. R244;76-77, 101-02. The State also introduced the video tape from the 7-Eleven surveillance camera. R244:95, 108.

During the State's case in chief, defense counsel elicited testimony that Peni had pled guilty to robbery and agreed to testify in exchange for a two-step reduction in his conviction. R244:43, 47-48. Counsel also introduced evidence that Terrye had previously pled guilty to attempted welfare fraud. R244:78.

After the State rested, defendant took the stand and related his version of the events. R244:119-28. He admitted stealing the beer, but denied hearing either Terrye or Ruland say anything as he left the store and got in the car. R244:123-24. He also denied visiting the 7-Eleven after the robbery and threatening Terrye. R244:128.

In closing argument, defense counsel asserted that the State overcharged the case and that defendant was only guilty of retail theft, not aggravated robbery. R244:177. He pointed out that defendant did not take the beer from Terrye's person or immediate presence because she was on the opposite side of the store from the beer cooler when defendant took the beer. R244:179. He also argued that Ruland did not have a weapon or a facsimile or representation of a weapon. R244:182.

## SUMMARY OF THE ARGUMENT

**Point I.** The probative value of evidence that defendant threatened Terrye if she testified against him is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The witness tampering evidence is highly relevant to defendant's consciousness of his guilt. For this reason the evidence was more probative than it was unfairly prejudicial. Contrary to defendant's unsupported claim, the witness tampering evidence is not rendered less probative merely because Terrye was unable to pinpoint the exact date defendant threatened her. The strength of the witness tampering evidence is only one of a variety of matters which should be considered and is not alone determinative. The trial court's well-supported admissibility ruling should therefore be upheld.

Even if the witness tampering evidence were erroneously admitted, the trial court gave a limiting instruction cautioning jurors that they could not convict defendant for aggravated robbery based solely on evidence of the witness tampering. There was also a wealth of additional evidence proving defendant's guilt. Indeed, defendant's and his testifying cohort's versions of the aggravated robbery differed only slightly from Terrye's. While defendant and Peni Teo claimed not to have heard a third cohort, Ruland Anthony, threaten Terrye, they also had an obvious motive for minimizing Ruland's conduct here. The jury thus reasonably accepted Terrye's testimony over that of defendant's and Peni's, and would have done so,

even without her further testimony that defendant later threatened her if she testified against him.

**Point II.** Defendant's claim that trial counsel was ineffective for failing to investigate potential witnesses is inadequate as a matter of law. This is because defendant bases his claim entirely on extra-record allegations he previously raised in an unsuccessful rule 23B remand motion. Defendant thus asks this Court to accept as substantive evidence extra-record allegations of ineffective assistance of counsel. This Court has already rejected those allegations as speculative. Because the record on appeal remains devoid of non-speculative evidence supporting defendant's claim of ineffectiveness, his claim lacks merit and must be rejected.

**Point III.** Defendant asserts that the trial court plainly erred in instructing the jury on the elements of aggravated robbery because the instruction did not include the element that defendant intended to permanently or temporarily deprive the 7-Eleven store of the stolen beer. Defendant's plain error challenge is foreclosed by the invited error doctrine because trial counsel affirmed the instruction on the record. Thus, only trial counsel's performance is relevant here. Defendant can prevail only if he can show that trial counsel's on-the-record affirmation of the aggravated robbery instruction was both deficient and prejudicial. Defendant cannot show that trial counsel's performance was deficient because his non-objection to, and affirmation of, the aggravated robbery instruction was consistent with defendant's trial strategy. Defendant has never contested that he was guilty of the beer

theft; he disputed only the threat which elevated the offense from a misdemeanor to a first degree felony. Nor was trial counsel's performance prejudicial. This is because the missing element of intent to permanently or temporarily deprive was never at issue. This Court has previously recognized that if the facts indisputably establish an element and the element is not an issue at trial, a trial court's failure to instruct on the element is not prejudicial. A complete instruction here would have changed nothing, because, as set forth above, defendant never claimed that he intended to return the stolen beer. Rather, defendant's defense was that he did not take the beer in a forceful or threatening manner. Thus, even if the jury had been instructed that defendant had to intend to permanently or temporarily deprive the 7-Eleven store of the stolen beer, a reasonable jury would have found that well-established and undisputed intent here. Defendant's claim of ineffectiveness should therefore be rejected.

## ARGUMENT

### POINT I

### THE PROBATIVE VALUE OF EVIDENCE THAT DEFENDANT THREATENED THE VICTIM—"IF [YOU] SHOW[] UP IN COURT [YOU WILL] BE DEAD"—IS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF THE ISSUES, OR MISLEADING THE JURY

In Point I of his brief, defendant claims that "the trial court erred in denying [his] request to prohibit the prosecution . . . from introducing . . . evidence regarding the alleged instances of witness tampering." Aplt. Br. at 8 (capitalization and boldface omitted).

Specifically, defendant claims that evidence he threatened Terrye Rowland that "if [she] showed up in court [she] would be dead," *see* R244:77, should have been excluded because he was "only made aware of allegations for the dates of June 30, 2003 and July 10, 2003," but that at trial, Terrye testified that he threatened her "near the end of July, 2003." Aplt. Br. at 10. Defendant contends that it was thus "difficult for [him] to defend against the . . . allegations or to present an alibi defense" because he did not have "the necessary specifics to allow him to mount a proper defense[.]" *Id.* Defendant therefore contends that evidence of the witness tampering, "although relevant, should have been prohibited [under rule 403, Utah Rules of Evidence,] as its probative value is far outweighed by the unfair prejudice caused by forcing [him] to attempt to defend against a vague allegation which was unsupported by evidence other than [Terrye's] own statements." Aplt. Br. at 10-11. Defendant's claim lacks merit and should be rejected.

**Proceedings below.** Before trial on 18 February 2004, trial counsel asked that evidence of defendant's witness tampering be excluded:

> There's an allegation that [defendant] pulled up in a car with several other individuals and said something to Miss Rowland and the State is going to try to bring that in. We would ask that that be left out. We think that it's more prejudicial than probative. It's not relevant. And it isn't [the] subject of another criminal offense—or criminal charge.

R244:9. The trial court interjected that it was his recollection that defendant "said to Ms. Rowland something to the effect that[, ']you show up in court and you're a dead lady[,'] or something to that effect[.]" *Id.* Trial counsel affirmed the trial court's recollection: "In

essence that's what the allegation said." *Id.* The trial court further observed that if defendant in fact made the threat it "would be relevant to show that he had a guilty state of mind, he wanted to keep the witnesses from coming to court[.]" R244:10. Trial counsel asserted that even if the witness tampering evidence was relevant, its "probative value [was] greatly outweighed by the prejudice. We haven't been given a specific date as to when that occurred, so we can't create an alibi. It's sort of a vague allegation that we really can't defend and I think it would be more prejudicial than probative to let that statement in." *Id.* Thereafter, the trial court denied defendant's request to exclude the witness tampering evidence:

> The danger of unfair prejudice in my judgment is not outweighed by its probative value if [defendant] or anyone charged with a crime threatens a witness, that would certainly have some bearing on their state of mind and whether or not they felt that they were guilty and the efforts they would make to keep a witness from appearing in court would be relevant in my judgment. So I'll overrule the objection, or deny the motion.

R244:11.

Accordingly, at trial, Terrye affirmed that although defendant had been ordered to stay away from the 7-Eleven pending trial, she had seen him there on four different occasions. R244:76. Defendant did not speak to Terrye the first three times he entered the 7-Eleven after the beer heist. *Id.* But on the fourth time, toward the end of July 2003, defendant told Terrye that "if [she] showed up in court [she] would be dead." R244:77. Shortly thereafter, on 5August 2003, Terrye quit her job at 7-Eleven "[b]ecause of what [defendant] said." *Id.*

The trial court instructed the jury, however, that evidence of defendant's threat or

witness tampering was insufficient by itself to establish defendant's guilt of the aggravated robbery and that the witness tampering evidence could only be considered "in light of all other proven facts in the case in determining" defendant's "guilt or innocence" of aggravated robbery. R152 (jury instruction # 26) (a copy is attached in addendum A).

**Analysis**. "When reviewing a trial court's ruling regarding the admissibility of evidence under Rule 403, '[this court] will not overturn the [trial] court's determination unless it was an abuse of discretion.'" *State v. Lindgren*, 910 P.2d 1268, 1271 (Utah App. 1996) (additional internal quotation marks omitted) (quoting *State v. White*, 880 P.2d 18, 20 (Utah App. 1994)) (additional citations omitted). Because the decision to admit or exclude evidence under rule 403 lies within the sound discretion of the trial court, "[the reviewing] court will only conclude that a trial court abused its discretion if the ruling 'was beyond the limits of reasonability.'" *Id.* (quoting *State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992)).

Although conceding its relevance, defendant argues that the probative value of evidence that he threatened Terrye, or that he committed witness tampering here, was outweighed by the danger of unfair prejudice and thus should have been excluded under rule 403. Aplt. Br. at 10-11. But relevant prejudicial evidence "may be excluded"only "if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403 (emphasis added).

"[E]vidence is not unfairly prejudicial simply because it is detrimental to a party's case." *State v. Kooyman*, 2005 UT App 222, ¶ 26, ___ P.3d ___ (internal quotations marks omitted) (quoting *United States v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001)). Moreover, under rule 403, relevant evidence is presumed admissible unless it "'has an unusual propensity to unfairly prejudice, inflame, or mislead the jury.'" *State v. Jaeger*, 1999 UT 1, ¶ 18, 973 P.2d 404 (quoting *State v. Dunn*, 850 P.2d 1201, 1221 (Utah 1993) (additional citations omitted)). The presumption is reversed in favor of inadmissibility only for evidence that is "'uniquely subject to being used to distort the deliberative process and skew a trial's outcome.'" *Dunn*, 850 P.2d at 1222 (quoting *State v Dibello*, 780 P.2d 1221, 1229 (Utah 1989)). The Utah Supreme Court has identified only three categories of evidence that are so prejudicial as to reverse the presumption. *See State v. Lafferty*, 749 P.2d 1239, 1256-57 (Utah 1988); *White*, 880 P.2d at 21. The three categories are (1) gruesome photographs of a homicide victim's corpse, (2) a rape victim's past sexual activities with someone other than the accused, and (3) statistical evidence of matters not susceptible to quantitative analysis, such as witness veracity. *See White*, 880 P.2d at 21.

In the instant case, defendant's threat that Terrye "would be dead" "if [she] showed up in court," *see* R244:77, does not fall into one of the three categories of presumptively prejudicial evidence. Evidence of defendant's threat or witness tampering, therefore, is presumed admissible unless its relevance "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah. R. Evid. 403.

Defendant has not shown that the relevance of the threat or witness tampering evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Utah. R. Evid. 403. As noted, defendant does not dispute the relevance of the witness tampering evidence. Aplt. Br. at 10 ("The introduction of this evidence, although relevant, should have been prohibited as its probative value is far outweighed by the unfair prejudice"). Nor could he. As found by the trial court, the threat evidence has "some bearing on [defendant's] state of mind and whether or not [he] felt that [he was] guilty and the efforts [he] would make to keep a witness from appearing in court would be relevant in my judgment." R244:11. For this purpose, the trial court found that the evidence was more probative than it was unfairly prejudicial. *Id.*

The trial court was correct. Courts have uniformly held that a defendant's improper attempts to influence a witness's testimony are admissible because such evidence is highly relevant to the defendant's "consciousness of guilt." *See, e.g., United States v. Gonsalves*, 668 F.2d 73, 74-76 (1st Cir. 1983) (Gonsalves's threat against adverse witness relevant to show consciousness of guilt); *United States v. Henderson*, 58 F.3d 1145, 1150 (7th Cir. 1995) (evidence of Henderson's attempts to influence prosecution witness evinced his guilty conscience of the underlying crimes); *United States v. Borland*, 12 M.J. 855, 857 (A.F. Ct. App. 1981) (Borland's request that witness lie for him was admissible to show consciousness of guilt); *State v. Williams*, 904 P.2d 437, 441-45 (Ariz. 1995) (evidence that Williams sought to suppress adverse evidence was relevant to show consciousness of guilt); *Morris v. State*,

731 S.W.2d 230, 231-232 (Ark. 1987) (attempted persuasion of a witness to change her testimony is relevant to show consciousness of guilt); *State v. Baker*, 773 P.2d 1194, 1199 (Mont. 1989) (Baker's suggestion to prosecution witness that he might "accidentally somehow" get amnesia, and his offer to send money if proven innocent was admissible as impeachment evidence to show consciousness of guilt); *Garza v. State*, 358 S.W.2d 622, 623 (Tex. Crim. App. 1962) (efforts of accused to induce a witness to testify falsely may be shown as indicating consciousness of guilt).

A defendant's attempt to bribe, threaten, or otherwise improperly influence a witness's testimony "indicates 'his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.'" *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986) (quoting Wigmore, *Evidence* § 278 (Chadbourn Rev. 1979)). It is a logical assumption that the "typical innocent person would not resort to" bribery, threats, or asking a witness to lie for him. Edward J. Imwinkelreid, *Uncharged Misconduct Evidence*, ¶3:04, at 9-10 (Rev. Ed. 1998). Moreover, "[l]ike evidence of flight from the scene of a crime, bribery of an adverse witness, or the destruction of incriminating evidence, threats made by a defendant respecting a specific hostile witness may imply that the party making the threat has something specific to hide." *Gonsalves*, 668 F.2d at 75. "The desire to 'cover something up,' in turn, implies a consciousness of guilt of the particular crime charged." *Id.* Certainly, a defendant's attempt to avoid conviction by threatening the robbery victim, as here, is an important, relevant fact

that the jury should know in assessing the validity and credibility of the defendant's stated position. *See Henderson v. State*, 910 S.W.2d 656, 659 (Ark. 1995) ("factfinder is entitled to know whether a defendant attempted to thwart his prosecution by secreting a witness who had implicated him in the charged offense"), *denial of habeas corpus reversed on other grounds by Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).

Defendant's threat or witness tampering is not rendered any less relevant or probative merely because he willingly admitted that he committed retail theft. *See, e.g.,* R244:179-180 (trial counsel: "This is a retail theft. . . . [Defendant's] intent was to steal the beer"). Evidence does not cease to be relevant because the defendant does not contest or offers to stipulate to particular facts. Indeed, "a stipulation of fact by defense counsel does not make evidence less relevant, nor is it a basis for depriving the prosecution the opportunity of profiting from the "'legitimate moral force'" of its evidence in persuading a jury." *State v. Gulbransen*, 2005 UT 7, ¶ 37, 106 P.3d 735; *see also State v. Bishop*, 753 P.2d 439, 475 (Utah 1988) ("A cold stipulation can deprive a party 'of the legitimate moral force of his evidence,' and can never fully substitute for tangible, physical evidence of the testimony of witnesses") (citations omitted). "[S]o long as the defendant maintains[s] his guilty plea, the State [has] the right to prove its case up to the hilt in whatever manner it [chooses], subject only to the rules of evidence and standards of fair play." *State v. Florez*, 777 P.2d 452, 455 (Utah 1989) (alterations in original) (quotation marks omitted) (quoting *People v. Hills*, 532 N.Y.S2d 269, 277 (N.Y. App. Div. 1988)). Moreover, because defendant admitted only

misdemeanor retail theft—as opposed to the first degree felony aggravated robbery with which he was charged—the witness tampering evidence is even more relevant and probative than it would have been otherwise. The jury could have reasonably inferred from the witness tampering evidence that if defendant were truly guilty only of a misdemeanor theft as he claimed, he would not have gone to the extreme measure of threatening the victim's life if she testified against him. *See* R244:76-77.

Contrary to defendant's claim, evidence of his threat or witness tampering is not rendered less probative merely because Terrye could not specify an exact date for its occurrence. *See* R244:76. Defendant's complaint about Terrye's inability to pinpoint the date on which he made the threat is a challenge to the strength of the witness tampering evidence and is thus a properly considered as one factor in determining the probative value of the threat. *See State v. Shickles*, 760 P.2d 291, 295 (Utah 1988) (observing that "a variety of matters must be considered" in determining probative value, "including the strength of the evidence as to the commission of the other crime"). But, the strength of the allegedly unfairly prejudicial evidence is only one "of a variety of matters" which "must be considered" and no one factor alone is determinative. *Id.* Thus, while Terrye's inability to specify the exact date the threat occurred could have arguably been used to impeach her testimony, it is not by itself grounds for excluding the threat evidence under rule 403.[2]

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[2]Defendant chose not to cross-examine Terrye regarding the threat or witness tampering incident, focusing instead on Terrye's prior conviction for attempted welfare fraud and the fact that she never saw a gun or any other weapon during the robbery. *See,*

Finally, there is nothing unfairly prejudicial about defendant's threat. It is not the type of evidence that would make a jury convict for the wrong reason. It is not gruesome, sexual, or statistical evidence incapable of quantitative analysis. *See White*, 880 P.2d at 21. Rather, defendant's threat was highly connected to the aggravated robbery that prompted it. The trial court also instructed the jury they could only use defendant's threat for a proper purpose. *See* R152 (jury instruction #26), addendum A. Juries are assumed to follow a trial court's instructions. *See Salt Lake City v. Garcia*, 912 P.2d 997, 1001 (Utah App. 1996).

But, even if admitting evidence of the threat or witness tampering incident were error, its admission was harmless in this case. Error is harmful only when but for its commission, there is a reasonable probability of a different outcome. *State v. Medina-Juarez*, 2001 UT 79, ¶ 18, 34 P.3d 187. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In determining whether an error was harmful, a court considers a number of factors, including "the overall strength of the State's case." *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992). "The more evidence . . . the less likely there was harmful error." *Id.*

The only disputed issues here were whether defendant committed aggravated robbery as opposed to retail theft, and whether defendant later threatened Terrye if she testified against him. Importantly, the jury was instructed that evidence of the witness tampering was insufficient by itself to support aggravated robbery and that it must be considered along with

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*e.g.*, R244:77-78 83.

the other evidence of the aggravated robbery. *See* R152 (instruction # 26), addendum A. Given this limiting instruction and the weight of the evidence against defendant, the jury did not convict him for aggravated robbery merely because he also threatened Terrye if she testified against him.

Indeed, defendant's own testimony corroborated Terrye's regarding the beer heist up until his cohort, Ruland Anthony, threatened Terrye. *See* R244:121-124. Defendant claimed not to have heard anything Terrye or his cohort said to each other. *Id.* According to Deputy Wilson, however, at the time of his arrest, defendant posited that Ruland threatened Terrye in order to stop her from following them. R244:100-01. Defendant's other cohort, the driver, Peni Teo, also corroborated Terrye's testimony up to the time the threat was made. Specifically, Peni said that Ruland got out of the car with defendant, but stopped short of entering the 7-Eleven. R244:34-36. Peni viewed a verbal exchange between Ruland and Terrye, but like defendant denied hearing what was said. R244:36. Thus, all three witnesses confirm that Ruland was where Terrye said he was when he made the threat. At trial, Peni and defendant differed from Terrye's testimony only as to whether the threat was made, although, as stated, defendant admitted to Deputy Wilson that he did hear a threat. Both defendant and Peni also have obvious motives for minimizing Ruland's conduct here. Terrye, on the other hand, had no motive to misrepresent Ruland's threat, *and* her version was further corroborated by Deputy Wilson's testimony regarding statements defendant made at the time of his arrest. *See* R244:100-01. The jury thus reasonably accepted Terrye's

testimony over that of defendant's and Peni's, even though she had a prior conviction for attempted welfare fraud. *See* R244:77-78. There is therefore no reasonable likelihood that the jury would have lost confidence in Terrye's testimony without her further testimony of defendant's subsequent threat or witness tampering. *Medina-Juarez*, 2001 UT 79, ¶ 18; *Hamilton*, 827 P.2d at 240. The well-supported jury verdict should, therefore, be affirmed.

## POINT II

### DEFENDANT CANNOT ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT INVESTIGATING ALLEGED POTENTIAL WITNESSES BECAUSE HE RELIES ENTIRELY ON EXTRA-RECORD MATERIAL TO SUPPORT HIS CLAIM

In Point II(A) of his brief, defendant alleges that "trial counsel was ineffective due to his failure to adequately investigate the [d]efendant's case and present witness testimony impeaching the credibility of the victim[.]" Aplt. Br. at 11. Defendant claims this alleged testimony was "particular[ly] critical in this case since the only evidence presented at trial regarding the alleged threat made to the victim by the co-defendant was the victim's own testimony." *Id.*

As explained below, defendant has not carried his burden of demonstrating his claim of ineffective assistance because it is entirely based on extra-record material and without any factual support in the record.

### A. Defendant has the burden to provide an adequate record to support his claims.

To prove a claim of ineffective assistance of counsel, defendant "must first demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984)). Defendant must also "show that counsel's deficient performance was prejudicial—i.e., that it affected the outcome of the case." *Id.* The first part of defendant's burden requires that he "rebut the strong presumption that 'under the circumstances, the challenged action might be considered sound trial strategy.'" *Id.* (quoting *Strickland*, 466 U.S. at 689) (other internal quotation marks and citations omitted).

When a defendant raises a claim of trial counsel's effectiveness on direct appeal, he or she "bears the burden of assuring the record is adequate." *Litherland*, 200 UT 76, ¶ 16. "The necessary consequence of this burden is that an appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware." *Id.* at ¶ 17. When the record is "inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.* Furthermore, it is well-settled that "[a]n appellate court's 'review is . . . limited to the evidence contained in the record on appeal.'" *State v. Pliego*, 1999 UT 8, ¶ 7, 974 P.2d 279 (quoting *Wilderness Bldg. Sys., Inc. v. Chapman*, 699 P.2d 766, 768 (Utah 1985)). *See also Chapman v. Chapman*, 728 P.2d 121, 123 (Utah 1986) (per

curiam) (appellate court cannot consider matters outside the record); *State v. Hutchings*, 672 P.2d 404, 404 (Utah 1983) (same); *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (An appellate court "simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record").

### B. Defendant's claim of ineffective assistance of counsel is not supported by record facts.

Defendant's claim of ineffectiveness is wholly unsupported in the record and, in fact, defendant impermissibly relies on extra-record material to support his claim that trial counsel allegedly failed to adequately investigate.

Defendant claims that before trial, his family and friends met with trial counsel and identified several witnesses for counsel to call at trial. Aplt. Br. at 13. Defendant claims that trial counsel's failure to call these alleged witnesses constituted deficient performance and that this failure prejudiced him because "[trial counsel] presented no independent evidence or testimony regarding Terrye Rowland's credibility as a witness," and the alleged "defense witnesses in questions rendered the victim, Terrye Rowland's, statements less than credible[.]" Aplt. Br. at 15. Nothing in the record supports defendant's claim that he identified witnesses to counsel who would impeach Terrye's credibility before trial. Absent any record support for this claim, it fails. *Litherland*, 200 UT 76, ¶ 16.

Given the lack of record support for his claim of ineffectiveness, defendant's brief rehashes his failed motion for remand under rule 23B, Utah Rules of Appellate Procedure. *See, e.g.,* Aplt. Br. at 13 (citing affidavits "which were attached to the Defendant's Motion

for Remand which was previously denied"). *See also* Motion to Remand Pursuant to Rule 23B and Order Denying Remand (copies are attached in addendum B). Although defendant acknowledges that the Court denied his rule 23B motion, he does not hesitate to ask that the Court accept as substantive evidence, the very extra-record allegations the Court has already rejected as mere speculation. *See* Order, dated 23 February 2005, *see* addendum B. Defendant's reliance on these extra-record allegations is improper and should be rejected. *See State v. Bredehoft*, 966 P.2d 285, 290 (Utah App. 1998) (granting State's motion to strike portions of Bredehoft's brief that relied upon his rule 23B affidavit on the ground that rule 23B affidavits are not substantive evidence of ineffective assistance).

Because the Court denied defendant's rule 23B motion, the record on appeal remains devoid of non-speculative evidence that trial counsel was ineffective for not investigating alleged potential witnesses. Absent any evidence that trial counsel should have known of, or called, the alleged potential witnesses identified in his brief, this Court must presume that trial counsel acted effectively. *Litherland*, 2000 UT 76, ¶ 17. "This presumption is consistent with the fundamental policies" undergirding ineffective assistance jurisprudence, that "'courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" *id.* (quoting *Strickland*, 466 U.S. at 689), "and with the general rule that record inadequacies result in an assumption of regularity on appeal." *Id.* (citing *State v. Robertson*, 932 P.2d 1219, 1226 (Utah 1997)). Defendant's wholly speculative claim of ineffectiveness thus fails as a matter of law. *Id.*

## POINT III

## DEFENDANT'S CLAIM OF PLAIN INSTRUCTIONAL ERROR IS PRECLUDED BY THE INVITED ERROR DOCTRINE AND HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT SUPPORTABLE BECAUSE TRIAL COUNSEL'S AFFIRMATION OF THE AGGRAVATED ROBBERY INSTRUCTION WAS REASONABLE TRIAL STRATEGY

In Points II(B) and III of his brief, defendant asserts that the trial court's instruction on the elements of aggravated robbery was plainly erroneous because it did not include the uncontested element that defendant intended to permanently or temporarily deprive the 7-Eleven store of the stolen beer. Aplt. Br. at 17-21. Defendant alternatively argues that his counsel was ineffective for not objecting to the instruction. Defendant may not obtain plain error review of this claim because he invited any error by affirmatively approving the instruction. Trial counsel was not ineffective for doing so because it was reasonable trial strategy.

**Proceedings below.** As noted, defendant's strategy below was to admit the beer theft, but to deny that he or his any of his cohorts threatened Terrye in stealing the beer. *See* R83 ("At trial, the Defendant Netzler will not dispute identification or that a theft of beer occurred. However, the Defendant will dispute that the theft occurred with the use of force or fear or that a gun was used or that the use of a gun was threatened"). Accordingly, trial counsel's opening statement informed the jury that defendant would testify and admit to stealing the beer, but that defendant would deny doing so with force. *See* R244:118 ("Mr. Netzler will tell you that he took the beer"). Just as trial counsel promised, defendant took

the stand and testified that he stole two cases of beer from the 7-Eleven: "I jumped out of the car, went in the store, and I looked at the freezer and I walked over there and grabbed two cases of beer." R244:121. Instead of stopping at the register to pay for the beer, defendant "went to a quick step to walk out of the store." *Id.* Defendant affirmed that it was his intention to "[j]ust grab the beer and leave," "[j]ust steal the beer." R244:122. According to defendant, he and his friends then drove back to defendant's "brother-in-law's house" and consumed the beer: "And we went there and just cracked the cases open and started handing the beer out." R244:124. Defendant also acknowledged telling Officer Wilson that stealing the beer was his idea. R244:125-126; *see also* R244:131-132.

Defendant challenged other of the trial court's proposed instructions, but did not challenge the trial court's instruction on the elements of aggravated robbery, even though it did not include the element that defendant intended to permanently or temporarily deprive the 7-Eleven store of the stolen beer. *See, e.g.,* R244:150-155, 162; *see also* R136 (instruction # 11) (a copy is attached in addendum C).

Significantly, defendant proposed instructions on the lesser-included-offense of retail theft, *see* R61-62, similarly lacked the element that defendant took the beer "with the intention of depriving the merchant permanently of the possession, use or benefit of [the beer] without paying the retail value of [the beer]." UTAH CODE ANN. § 76-6-602(1) (West 2004). Defendant's proposed instructions were given in substance. *Compare* R61-62 and

R142 (instruction # 17) (copies of defendant's proposed instructions, along with the trial court's retail theft instruction, are attached in addendum C).

Defendant's non-objection to the aggravated robbery instruction and his proposed retail theft instructions were consistent with his strategy to admit that he committed retail theft and deny only the aggravating conduct. Indeed, during the course of discussing the proposed jury instructions, trial counsel affirmed that he would not deny that defendant committed retail theft in his closing argument. R244:164. When the trial court asked if defendant took "any exception" to the finalized instructions, trial counsel affirmed that he did not: "No, your Honor." *Id.* Finally, the trial court further inquired if counsel was "satisfied" with the finalized instructions and trial counsel replied, "I am." *Id.*

Thereafter, the trial court instructed the jury on the elements of aggravated robbery *and* the lesser offense of retail theft, but did not include in either instruction the element that the defendant intended to deprive the 7-Eleven store of the stolen beer. *See* R136 (instruction # 11) (aggravated robbery); R142 (instruction # 17 (retail theft)), *see* addendum C. Following jury instruction, both parties presented closing argument and trial counsel repeatedly asserted that defendant's intent was only to steal the beer and thus defendant was guilty of no more than retail theft. *See* R244:179-182, 184, 186-187.

### A. Any error in the elements instruction for aggravated robbery was invited; therefore, review for plain error is foreclosed.

As noted above, defendant claims that the trial court's elements instruction on aggravated robbery was plainly erroneous because it "failed to include an essential intent element, i.e., that the [d]efendant take the personal property of another 'with the purpose or intent to deprive the person permanently or temporarily of the personal property.'" Aplt. Br. at 19 (citing R135-136 (instructions ## 10-11)). *See also* UTAH CODE ANN. § 76-6-301(1)(a) (West 2004) ("A person commits robbery if . . . the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear, and with a purpose or intent to deprive the person permanently or temporarily of the personal property").

Defendant's claim of plain instructional error is foreclosed by the invited error doctrine. In addition to not objecting to the elements instruction for aggravated robbery, and submitting a retail theft instruction which lacked a similar intent element, trial counsel approved all of the instructions given on the record, *see* R244:164. Thus, any defect in the elements instruction for aggravated robbery was invited and may not now be reviewed. *See State v. Pinder*, 2005 UT 15, ¶¶ 62-63, 520 Utah Adv. Rep. 27 (declining to review claim of instructional error where defendant "signal[ed] by an affirmative act that he had no objection" to the instruction below). *See also State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (holding that if "counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction, [the appellate court] will not review

the instruction" even under plain error exception); *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989) (declining to reach plain error claim—where non-objection was conscious strategy—because it would "be sanctioning a procedure that fosters invited error"). Thus, only trial counsel's performance is relevant here and defendant can prevail only if he can show that trial counsel's on-the-record affirmation of the instructions given was constitutionally ineffective.

### B. Trial counsel acted reasonably in affirming an elements instruction that did not include an uncontested element.

For relief under the ineffective assistance of counsel doctrine, "defendant must (i) identify specific acts or omissions by counsel that fall below the standard of reasonable professional assistance when considered at the time of the act or omission and under all the attendant circumstances, and (ii) demonstrate that counsel's error prejudiced the defendant, i.e., that but for the error, there is a reasonable probability that the verdict would have been more favorable to the defendant." *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993). If defendant fails to establish either deficient performance or prejudice, his claim of ineffective assistance of counsel fails as a matter of law. *State v. Germonto*, 868 P.2d 50, 61 (Utah 1993). "Given the arduous nature of the defendant's burden, ineffective assistance of counsel claims rarely succeed." *State v. Snyder*, 860 P.2d 351, 354 (Utah App. 1993).

**No deficient performance.** Similar to his claim of plain error, defendant asserts that trial counsel was deficient because he did not object to the elements instruction on aggravated robbery, which "failed to include an essential element of intent, i.e., that the

[d]efendant take the personal property of another 'with the purpose or intent to deprive the person permanently or temporarily of the personal property.'" Aplt. Br. at 17 (citing R135-136). *See also* UTAH CODE ANN. § 76-6-301(1)(a) (West 2004). Defendant cannot prevail on his claim of deficient performance, however, because trial counsel's affirmation of the aggravated robbery instruction was reasonable on this record. *See State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (holding ineffective assistance of counsel claim fails if counsel's "actions might be considered sound trial strategy") (internal quotation marks and citations omitted)).

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Therefore, to prove that trial counsel's affirmation of the aggravated robbery instruction fell below an objective standard of reasonableness, "defendant must overcome the strong presumption that trial counsel rendered adequate assistance by persuading the court that there was no *conceivable tactical basis* for counsel's actions." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 (internal quotations and citations omitted, emphasis in original). "If the conceivable tactical bas[e]s for defense counsel's actions are apparent, [d]efendant has not overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *State v. Holbert*, 2002 UT App 426, ¶ 58, 61 P.3d 281 (internal quotations and citations omitted, first alteration in original); *see also State v.*

*Parker*, 2000 UT 51, ¶ 11, 4 P.3d 778 (no deficiency where counsel conceivably acted deliberately and tactically).

Defendant has not and cannot make this showing. Defendant fails to acknowledge in his brief that his strategy below was to admit stealing the beer and deny only that either he or his cohorts threatened Terrye for purposes of the aggravated robbery statute. *Compare* Aplt. Br. at 17-18 *and* R244:123-124, 177, 179, 182. Accordingly, as set forth above, defendant has never disputed that he took the beer, or that he intended to permanently or temporarily deprive the 7-Eleven store of the stolen beer. R83; *see also* R244:122-124. To the contrary, defendant has steadfastly maintained that taking or depriving the 7-Eleven of the beer was the extent of his intent here. *Id.* Specifically, defendant's strategy was to curry favor with the jury and thereby defeat the aggravated robbery charge by admitting his responsibility for the well-established misdemeanor beer theft. *Id*; *see also* R61-62, addendum C. There is thus apparent on the record a conceivable and reasonable tactical basis for trial counsel's non-objection and affirmation of an aggravated robbery instruction which did not include this uncontested element. *See Clark*, 2004 UT 25, ¶ 6 (requiring defendants claiming ineffectiveness to demonstrate "that there was *no conceivable tactical basis* for counsel's actions") (internal quotations and citations omitted, emphasis in original); *see also Litherland*, 2000 UT 76, ¶ 19; *Parker*, 2000 UT 51, ¶ 11.

**No prejudice.** Even assuming arguendo that trial counsel's performance was unreasonable and thus deficient, no prejudice resulted. This is because the missing element of intent to permanently or temporarily deprive was never at issue.

To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Moreover, "proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993).

Incomplete elements instructions are not invariably prejudicial; whether omission of an element of the crime is prejudicial depends on the facts of the case. This Court has previously recognized that if the facts indisputably establish an element and the element is not an issue at trial, as here, then a trial court's failure to instruct on the element is not prejudicial. *See State v. Stevenson*, 884 P.2d 1287, 1292 (Utah App. 1994) (holding failure to instruct on nonmarriage element of rape statute was harmless because nonmarriage was undisputed at trial). *See also State v. Casey*, 2003 UT 55, ¶¶ 48, 51, 82 P.3d 1106 (holding that an erroneous instruction that defendant who acted knowingly could be guilty of attempted murder was harmless on the facts of the case); *State v. Bluff*, 2002 UT 66, 52 P.3d 1210 (holding that failure to instruct the jury on the "other than a party" element of felony murder was not error where defendant never contended child sexual abuse victim was a party

to the felony that resulted in her death); *State v. Fontana*, 680 P.2d 1042, 1048-1049 (Utah 1984) (holding that omitting "knowing" mental state from elements instruction was not prejudicial in second-degree murder case).

Here, defendant must establish as a "demonstrable reality," *Fernandez*, 870 P.2d at 877, that had trial counsel objected to the aggravated robbery instruction, the trial court would have included the element of intent to permanently or temporarily deprive, and that "the facts of this case do not support a conviction" for aggravated robbery under a complete instruction. *State v. Finlayson*, 994 P.2d 1243, 1249 (Utah 2000). Defendant has not and cannot make this showing.

For all the reasons set forth above, a complete instruction here would have changed nothing. Defendant's defense was not that he intended to return the beer momentarily; indeed, defendant and his cohorts almost immediately began drinking the stolen beer. *See* R244:124. Rather, defendant's defense was that he did not take the beer in a forceful or threatening manner. *See* R244:118-124; *see also* R244:164, 177, 179-181. Thus, even if the jury had been instructed that defendant had to have the intent to permanently or temporarily deprive the 7-Eleven of the stolen beer, a reasonable jury could have found that well-established and undisputed intent here, particularly in view of defendant's concession. *See Stevenson*, 884 P.2d at 1292.

Accordingly, there is no reasonable likelihood that an aggravated robbery instruction which included an intent "to permanently or temporarily deprive" would have altered the trial outcome. Defendant's claim of ineffective assistance thus fails on the prejudice prong.

## CONCLUSION

Defendant's aggravated robbery conviction should be affirmed.

## ORAL ARGUMENT REQUESTED

The State requests oral argument. Oral argument is allowed in all cases unless the court concludes that (1) the appeal is frivolous; (2) the dispositive issues have been recently and authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Rule 29(a), Utah Rules of Appellate Procedure. Here, the decisional process would be significantly aided by oral argument.

RESPECTFULLY submitted on 1 June 2005.

MARK L. SHURTLEFF
Utah Attorney General

MARIAN DECKER
Assistant Attorney General

## MAILING CERTIFICATE

I certify that on 1 June 2005, I mailed a copy of the foregoing BRIEF OF APPELLEE, postage prepaid, to the following:

JASON SCHATZ
SCHATZ & ANDERSON
356 East 900 South
Salt Lake City, Utah 84111

Attorney for Appellant

# Addenda

# Addendum A

INSTRUCTION NO. 26

The threatening of a witness immediately after the commission of a crime, or after that person is accused of a crime that has been committed, is not sufficient in itself to establish the defendant's guilt. However, such threat, if proved, may be considered by you in light of all other proven facts in the case in determining guilt or innocence.

Although consciousness of guilt may be inferred from a threat, it does not necessarily reflect actual guilt of the crime charged. Therefore, whether or not evidence of a threat shows a consciousness of guilt and the significance, if any, to be attached to any such evidence are matters exclusively within the province of the jury.

# Addendum B

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Schatz & Anderson
Attorneys for Defendant
356 E. 900 S.
Salt Lake City, UT 84111
Phone (801) 746-0447
Fax (801) 579-0606



IN THE UTAH COURT OF APPEALS,

IN AND FOR THE STATE OF UTAH

| | | |
|---|---|---|
| Harold Netzler, | : | MOTION TO REMAND PURSUANT TO RULE 23B OF THE UTAH RULES OF |
| Defendant/Appellant, | : | APPELLATE PROCEDURE |
| v. | : | CASE # 20040471-CA |
| State of Utah, | : | |
| Plaintiff/Appellee. | : | |

COMES NOW the Defendant/Appellant, Harold Netzler, by and through his attorney, Jason Schatz, and hereby moves the Utah Court of Appeals to enter an order remanding this case to the Third District Court pursuant to Rule 23B of the Utah Rules of Appellate Procedure for entry of findings of fact necessary for the Utah Court of Appeals' determination of the Appellant's claim of ineffective assistance of counsel.

**STATEMENT OF CASE**

The Defendant was tried before a jury in Third District Court, the Honorable Robin Reese presiding, on February 19, 2004. At trial he was convicted for Aggravated Robbery and the final

waiting car with the two packs of beer followed by Mr. Anthony and the three suspects fled the scene. Harold was apprehended later that morning without incident and admitted to stealing the beer.

## INNEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

"To establish an ineffective assistance of counsel claim, 'a defendant first must demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgement.' " *State v. Bluff*, 2002 UT 66,¶ 29, 52 P.3d 1210 (quoting *State v. Litherland*, 2000 UT 76,¶ 19, 12 P.3d 92), *cert. denied*, 537 U.S. 1172, 123 S.Ct. 999 (2003). "Second, the defendant must show that counsel's deficient performance was prejudicial--i.e., that it affected the outcome of the case." *Id.* (quotations and citation omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). It is the position of Harold Netzler that his trial counsel was ineffective due to the fact that his trial counsel failed to make contact with several potential defense witness or to call them to testify at trial, nor did he request a continuance in order to secure their attendance at trial. This failure fell below a reasonable standard of care for a lawyer and adversely affected the presentation of the Defendant's case at trial.

Prior to trial, Harold's trial counsel, Clayton Simms, had been advised of the existence of several potential witnesses who could be called to testify at trial regarding the character and reputation for truthfulness of the victim, Terry Rowland, as well as the fact that she had told several different accounts of the events surrounding the allegations and charges against Harold for allegedly threatening her in an attempt to get her not testify at trial. At the time of trial in this

several witnesses willing and able to come to court and testify regarding Terry Rowland's reputation for truthfulness as well as the differing stories she has told other employees regarding the incident involving Harold Netzler, Mr. Simms called no witnesses at trial to impeach Terry Rowland's credibility. Mr. Simms' only attempt at attacking the credibility of Terry Rowland, the state's primary witness and the only witness who gave testimony or evidence regarding the alleged threat by Ruland Anthony which turned a run of the mill beer run theft into an aggravated robbery, was to inquire about a welfare fraud charge which Terry Rowland had pled guilty to in 1991. Mr. Simms presented no independent evidence or testimony regarding Terry Rowland's credibility as a witness.

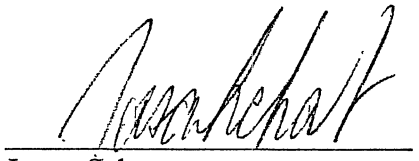
Following Harold's conviction at trial of Aggravated Robbery, Harold's family gathered up enough money to retain private defense counsel for purposes of Harold's sentencing and appeal of the Aggravated Robbery Conviction and to represent Harold on the pending Witness Tampering charge. As Harold's new defense counsel, I retained the services of a private investigator to interview the other employees of the 7-11 which were mentioned by Tina Spann and John Kamai. The defense's private investigator contacted and/or interviewed several witnesses including, Cindy Raymond, the other employee who was working with Terry Rowland on the night of the alleged robbery, Jenny Littlefield, the manage of the 7-11 store where the robbery took place, and Allen Larsen, Terry Rowland's co-worker at the 7-11. The interviews with these witnesses revealed that Terry Rowland had a very poor reputation for truthfulness and was less than trustworthy and that she had been untruthful regarding her statements, particularly with regard to the alleged instances of witness tampering. After these interviews were conducted, the defendant's new defense counsel contacted the Salt Lake County District Attorney

charge.

## REQUEST FOR REMAND FOR FINDINGS

THEREFORE, pursuant to Rule 23B of the Utah Rules of Appellate Procedure, the Defendant, Harold Netzler, hereby moves this court to enter an order remanding the above entitled case to the Third District Court for an evidentiary hearing to enter findings necessary to the appellate court's determination of the Defendant's ineffective assistance of counsel claim. The Defendant specifically requests that the trial court enter findings of facts regarding his trial counsel's failure to contact and/or secure the attendance of several potential defense witnesses as outlined above.

DATED this 10th day of January, 2005.



Jason Schatz
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

Harold Netzler,

Defendant and Appellant.

ORDER DENYING REMAND

Case No. 20040471-CA

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Before Judges Greenwood, Jackson, and Thorne.

This is before the court on a motion for remand under rule 23B of the Utah Rules of Appellate Procedure. A remand is available only upon "a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective," including facts that show "the claimed deficient performance" and "the claimed prejudice suffered by the appellant as a result of the claimed deficient performance." Utah R. App. P. 23B (a),(b).

"A defendant must specifically identify uncalled witnesses and identify specific facts of their testimony that might have helped his case." State v. Johnston, 2000 UT App 290,¶10, 13 P.3d 175. Netzler has not provided affidavits from the proposed witnesses specifying their testimony. He presents affidavits from two intermediate witnesses establishing that trial counsel was informed, the day before trial, that some co-workers questioned the clerk's credibility. However, there is nothing that presents the specific facts the co-workers would have presented in their testimony.

Additionally, Netzler has failed to show prejudice by the alleged failure to investigate and call the co-workers. Netzler admitted to the theft of the beer. The case was not about identity or credibility of witnesses. Netzler's own confession corroborated the clerk's version of the events of the robbery.

MOB 2/24/05 JM

CERTIFICATE OF MAILING

I hereby certify that on February 23, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

MATTHEW D BATES
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

STEVE ANDERSON
JASON SCHATZ
SCHATZ & ANDERSON
356 E 900 S
SALT LAKE CITY UT 84111

Dated this February 23, 2005.

By _____
Deputy Clerk

Case No. 20040471
District Court No. 031901024

# Addendum C

INSTRUCTION NO._____

You are instructed that you may consider retail theft as a lesser included offense of Aggravated Robbery. You cannot find the Defendant guilty of retail theft unless all of the following elements are true beyond a reasonable doubt:

1. On or about February 6, 2003;

2. Defendant, Harold Augustin Netzler;

3. Took possession of, concealed, carried away, transferred or caused to be carried away or transferred;

4. Merchandise displayed, held, stored or offered for sale in a retail mercantile establishment;

5. Without paying the retail value of the merchandise;

6. And that all acts took place in Salt Lake County, Utah.

If the prosecution has failed to prove any one of these elements beyond a reasonable doubt, then you must find the Defendant, Harold Augustin Netzler, not guilty of retail theft. However, if the prosecution has proved each one of the foregoing elements beyond a reasonable doubt, then you must find the Defendant guilty of retail theft.

INSTRUCTION NO._____

You are instructed that you shall consider the crime of retail theft, which is a lesser included offense of Aggravated Robbery. You may find the defendant guilty or not guilty of Aggravated Robbery or guilty or not guilty of Retail Theft, but you may not find the defendant guilty of both Retail Theft and Aggravated Robbery.

You cannot find the Defendant guilty of retail theft unless all of the following elements are true beyond a reasonable doubt:

1. On or about February 6, 2003;

2. Defendant, Harold Augustin Netzler;

3. Took possession of, concealed, carried away, transferred or caused to be carried away or transferred;

4. Merchandise displayed, held, stored or offered for sale in a retail mercantile establishment;

5. Without paying the retail value of the merchandise;

6. And that all acts took place in Salt Lake County, Utah.

If the prosecution has failed to prove any one of the elements of Retail Theft beyond a reasonable doubt, then you must find the Defendant, Harold Augustin Netzler, not guilty of retail theft. However, if the prosecution has proved each one of the foregoing elements beyond a reasonable doubt, then you must find the Defendant guilty of retail theft.

FILED IN SUBSTANCE

INSTRUCTION NO. 11

Before you can convict the defendant, Harold A. Netzler of the offense of Aggravated Robbery as charged in the information, you must find from all of the evidence and beyond a reasonable doubt each and every one of the following elements of that offense:

1. That on or about the 6th day of February, ~~2002~~ 2003, in Salt Lake County, State of Utah, the defendant, Harold A. Netzler, took personal property then in the possession of, or, from the person or immediate presence of Terye Rowland; and

2. That such taking was unlawful; and

3. That such taking was intentional; and

4. That such taking was against the will of Terye Rowland; and

5. That such taking was accomplished by means of force or fear; and

6. That in the course of committing such taking, a dangerous weapon was used.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Aggravated Robbery as charged in the information. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

INSTRUCTION NO. 17

You are instructed that you may consider the crime of retail theft, which is a lesser included offense of Aggravated Robbery. You may find the defendant guilty or not guilty of Aggravated Robbery or guilty or not guilty of Retail Theft, but you may not find the defendant guilty of both Retail Theft and Aggravated Robbery.

You cannot find the Defendant guilty of retail theft unless all of the following elements are true beyond a reasonable doubt:

1. On or about February 6, 2003;

2. Defendant, Harold Augustin Netzler;

3. Took possession of, concealed, carried away, transferred or caused to be carried away or transferred;

4. Merchandise displayed, held, stored or offered for sale in a retail mercantile establishment;

5. Without paying the retail value of the merchandise;

6. And that all acts took place in Salt Lake County, Utah.

If the prosecution has failed to prove any one of the elements of Retail Theft beyond a reasonable doubt, then you must find the Defendant, Harold Augustin Netzler, not guilty of retail theft. However, if the prosecution has proved each one of the foregoing elements beyond a reasonable doubt, then you must find the Defendant guilty of retail theft.